Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Promoting Telehealth and	)	WC Docket No. 17-310
Telemedicine in Rural America	)	

REPLY COMMENTS OF GCI COMMUNICATION CORP.

Tina Pidgeon
Christopher Nierman
GCI COMMUNICATION CORP.
1900 L Street, NW, Suite 700
Washington, DC 20036
(202) 457-8815

John T. Nakahata
Jennifer P. Bagg
Courtney Miller
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street, NW
Washington, DC 20036
(202) 730-1300

Counsel for GCI Communication Corp.

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SUMMARY AND INTRODUCTION

GCI Communication Corp. ("GCI") hereby files reply comments in support of its Application for Review ("GCI Application for Review" or "AFR") filed with the Federal Communications Commission ("FCC" or "Commission") on November 9, 2018.[1] Only one party—Arctic Slope Telephone Association Cooperative, Inc. ("ASTAC")—filed comments responding to the GCI Application for Review.[2] And even that party does not defend either the substance of the Bureau Decision or the procedure used.

In fact, ASTAC makes clear that no party could have known that the Wireline Competition Bureau ("Bureau") would reach the results it did here. That conclusion is underscored by the Public Notice released by the Bureau on February 15, 2019, which for the first time announced some (but not all) of the Bureau's new interpretations of 47 C.F.R. § 54.607(a) with respect to comparable commercial rates, and which provided some (but not all) of the required parameters of a cost study.[3] ASTAC accordingly calls for "a full and open rate proceeding for the purpose of establishing the rate setting methodology" applicable "in [Fiscal

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[1] Application for Review of GCI Communication Corp., WC Docket No. 17-310 (filed Nov. 9, 2018) ("GCI Application for Review"). The GCI Application for Review sought review of the Letter from Elizabeth Drogula, Deputy Div. Chief, Wireline Comp. Bur., to J. Nakahata & J. Bagg, Counsel for GCI (Oct. 10, 2018) ("Bureau Decision" or "Decision"). The Decision was released to the public on January 2, 2019, as an attachment to the Public Notice seeking comment on the GCI Application for Review of the Decision. *See Promoting Telehealth and Telemedicine in Rural America*, Public Notice, DA 19-8, WC Docket No. 17-310 (rel. Jan. 2, 2019). GCI filed a supplement to the GCI Application for Review on January 29, 2019. *See* Supplement to Application for Review of GCI Communication Corp., WC Docket No. 17-310 (filed Jan. 29, 2019).

[2] Comments of Artic Slope Telephone Association Cooperative, Inc. on the GCI Application for Review, WC Docket No. 17-310 (filed Feb. 4, 2019) ("ASTAC Comments").

[3] *The Wireline Competition Bureau Provides Guidance Regarding the Commission's Rules for Determining Rural Rates in the Rural Health Care Telecommunications Program*, Public Notice, DA No. 19-92, WC Docket No. 02-60 (rel. Feb. 15, 2019) ("Public Notice").

Year] 2017 and future years."[4] Indeed, ASTAC correctly states that the Bureau Decision "fails to provide adequate guidance to establish going-forward rural rates," as the issuance of the Public Notice confirms [5] ASTAC's statements and the Public Notice underscore that the rule interpretations and ratemaking parameters that the Bureau improperly chose to apply in this first-of-its-kind proceeding were not reasonably knowable in advance—and thus illustrate that GCI (or any other party, including health care providers) could not possibly have had notice of them. As GCI pointed out in its AFR, it had twice previously justified its rural rates in the Rural Health Care ("RHC") Program using a per-Mbps comparison with commercial sales, which the Bureau disregarded here. This lack of notice cannot be cured *post hoc* by the full Commission on review.

ASTAC and GCI agree that the Commission must provide certainty to all Alaskan service and health care providers. But that certainty cannot be provided when, as here, the Bureau (1) adopts new *post hoc* interpretations of 47 C.F.R. § 54.607(a) regarding rates charged to comparable commercial customers that dramatically narrow the applicability of that section (now partially acknowledged by the Public Notice); (2) adopts novel cost allocation requirements that do not comport with the statute (not discussed in the Public Notice); or (3) prescribes a rate of return with no statutorily-required hearing, rulemaking, or analysis (also not discussed in the Public Notice).

Although ASTAC urges the Commission to reject GCI's AFR, it offers no coherent economic basis for doing so. First, with respect to areas that can be reached only by satellite,

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[4] ASTAC Comments at 1. Ironically, ASTAC ignores the pending rulemaking in this docket.

[5] *Id*. at 7.

ASTAC acknowledges "there are often multiple satellite providers."[6] Indeed, there are four providers—AT&T, ACS, Leonardo/DRS, and GCI—that can reach any location in the state. These are all actual or potential competitors in every community, and ASTAC presents no evidence to the contrary.

Second, with respect to GCI's TERRA service, ASTAC offers nothing beyond unsubstantiated invective. In the first instance, ASTAC's communities are not on the TERRA networks, and thus could not have been affected by GCI's TERRA pricing. ASTAC's claims of cross-subsidy are unfounded and economically irrational, especially in the face of Quintillion's entry. Although ASTAC cites some differences between satellite and terrestrial middle-mile services, it provides no evidence that these differences are significant enough to create market power (i.e., that they are actually a separate product market) or that any such power would not be adequately disciplined by potential entry. And more fundamentally, it does not explain why it would be rational to deregulate all of these services generally on the basis of competition—which the Commission has done in Alaska as well as the rest of the United States—but then to price-regulate them only when sold to rural health care providers. These deregulatory decisions were Commission decisions, made without any exceptions.

The only way the Commission, pending completion of its open rulemaking, can achieve the certainty that health care providers and carriers need to utilize the RHC Telecom Program effectively is by granting the GCI Application for Review and interpreting and applying the RHC Telecom Program rules in a manner consistent with the deregulation that has occurred since those rules were promulgated.[7] The Commission must recognize that both health care providers

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[6] *Id*. at 9.

[7] ASTAC has been conspicuously absent from the Federal Communications Commission's open proceeding seeking comment on reforming the RHC Telecom Program. *See Promoting*

and carriers like GCI have relied upon interpretations of Program rules that USAC previously endorsed. As explained in the GCI Application for Review, the Bureau Decision's substantive legal and economic deficiencies, as well as its procedural deficiencies, must be corrected.[8]

I. ASTAC Confirms that GCI Lacked Notice of the Bureau's Novel and Erroneous Reinterpretations of 47 C.F.R. § 54.607(a) and the Parameters of Its Cost-of-Service Rate Regulation.

Notwithstanding that it urges the Commission to deny GCI's AFR, ASTAC actually agrees with GCI that the Bureau Decision "fails to provide adequate guidance to establish going-forward rural rates" and leaves potential bidders without knowledge of the "methodology that would be applied to rural rate setting in Alaska for future RHC projects."[9] ASTAC also acknowledges "lack of clear direction on how to set rural rates in markets."[10]

A. The Bureau Decision Is Based on an Unexplained, Novel, and Erroneous Reinterpretation of Section 54.607(a).

As GCI explained in its AFR, GCI used the same methodology consistently over the years to justify the rural rates in its health care provider contracts pursuant to 47 C.F.R. § 54.607(a)'s comparable commercial rates test. This methodology focused on per-Mbps rate comparisons, both for satellite-based and TERRA services, and allowed for comparison of middle-mile rates over the same network, even where there were different endpoint destinations (i.e., not the same end-to-end route). This methodology also recognized that for satellite

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Telehealth in Rural America, Notice of Proposed Rulemaking and Order, 32 FCC Rcd. 10631 (2017); *Wireline Competition Bureau Seeks Additional Comment on Determining Urban and Rural Rates in the Rural Health Care Program*, Public Notice, DA No. 18-1226, WC Docket No. 17-310 (rel. Dec. 4, 2018). Indeed, it is unclear whether ASTAC has ever participated in the RHC Program at all.

8 *See generally* GCI Application for Review.

9 ASTAC Comments at 7.

10 *Id.*

services, there are not meaningful economies of scale because of the need to continue to purchase additional transponder capacity as bandwidth needs increase.

USAC approved the methodology on multiple occasions. In 2009 to 2010, for example, USAC engaged in an extensive pre-commitment review of one of Alaska's largest health care providers, and that process ultimately approved funding for all of the providers' locations based on the methodology rejected here.[11] More recently, in August 2015, USAC audited several contracts from Fiscal Year ("FY") 2012, for which GCI again used the same methodology, and USAC again approved the rates—rates that were in fact higher than those at issue here.[12] USAC has no authority to set policy or interpret unclear rules, so GCI relied on those prior approvals as reflecting Bureau and Commission policy in continuing to use that methodology for FY 2017 rural rates.[13]

ASTAC asserts that GCI had no commercial customers for the TERRA network in 2017, and thus could not justify its rates under 47 C.F.R. § 54.607(a).[14] But that is wrong. GCI had commercial customers for both its TERRA middle-mile and satellite middle-mile services in 2017, and GCI presented the Bureau with per-Mbps comparisons of its middle-mile rates, as it had presented to USAC in previous years. What changed, without notice, was the Bureau's interpretation and application of § 54.607(a).

In its review of GCI's rates, the Bureau made several novel reinterpretations of § 54.607(a). First, it required that all comparisons be end-to-end, even when ascertaining the comparable middle-mile rate. This eliminated comparisons between middle-mile rates where the

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11 *See* GCI Application for Review at 24.

12 *Id*.

13 *See* 47 C.F.R. § 54.702(c).

14 ASTAC Comments at 10.

channel terminations at either end were not in communities served by the same ILEC. Notably, the Public Notice relies on the *Universal Service First Report and Order* for this proposition, but that order did not address how to compare middle-mile rates, particularly when postalized. In that order, the Commission stated that it was considering the cost of the whole end-to-end circuit, including per mile charges over the entire distance of the circuit.[15] That Order did not suggest that middle-mile rates could not be compared between commercial and health care provider sales, separate from channel terminations; nonetheless, the Public Notice now makes that leap by precluding comparison of rates for components of the circuit.[16]

Second, the Bureau Decision announced that, even within its safe harbor ranges (1.41-8 Mbps and 8.1-50 Mbps), circuit rates must be computed based on a simple average, rather than by averaging per-Mbps rates—thereby irrationally treating circuits of differing capacities as if they were the same. Nothing in the Public Notice addresses this point. While the Public Notice states that rates for comparable circuits must be averaged, it provides no explanation or basis for taking a simple average of circuit prices for circuits of differing capacity that have been deemed functionally equivalent because they are within the safe harbor ranges.[17]

Third, the Bureau Decision failed to consider per-Mbps comparisons for circuits above 50 Mbps, which GCI had proposed to group into two ranges for comparison. The Public Notice makes clear that the safe harbor ranges are voluntary and provides no guidance as to how to treat capacities above the outdated safe harbor ranges.

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[15] *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd. 8776, 9127–29 ¶¶ 673–75 (1997) ("*Universal Service First Report and Order*").

[16] Public Notice at 4. In 1997, when the *Universal Service First Report and* Order was issued, interexchange middle-mile and local channel terminations would have been purchased from separate tariffs.

[17] *See id*. at 4 & n.26.

Fourth, the Bureau Decision ignored GCI's engineering- and economics-based evidence that satellite services lacked meaningful economies of scale, and thus rejected GCI's use of per-Mbps rates for commercial T-1 circuits to justify higher bandwidth (up to 40 Mbps) satellite middle-mile circuits. The Bureau Decision was thus not reasonable and was arbitrary.

As the Public Notice now demonstrates, none of GCI, ASTAC, or any other RHC Telecom Program participant could have anticipated that the Bureau would make these novel reinterpretations, and the Bureau Decision did not acknowledge or explain them. Moreover, the Public Notice still does not address or cogently explain any of these decisions.

As explained in detail in the GCI Application for Review, this absence of guidance plainly fails the reasoned decisionmaking requirement of the APA and therefore necessitates granting the AFR.[18] But beyond procedural failings, more reasonable interpretations of existing rules would have used commercial market transactions to validate GCI's rural rates, providing greater certainty and better reconciling the rules to the Commission's deregulated market structure.

For instance, the Commission should, at a minimum, correct the following:

- First, middle-mile rate comparisons should not be circumscribed by tail circuit termination points where the middle-mile segment price does not vary based on those termination points. Yet that is what the Bureau's end-to-end requirement does, even though there is no impact on the validity of the comparison of middle-mile rates. GCI previously compared its TERRA middle-mile rates across the region in which it was sold. Nevertheless, the Bureau precluded that here.

[18] GCI Application for Review at 17.

- Second, the comparable rates must be based on a rational per-Mbps basis rather than the average of the total cost of service for a circuit within a safe harbor range, without regard to the service bandwidth. The outcome of a "total cost comparison" is entirely irrational and would, in many cases, allow service providers to justify much higher rates for lower bandwidth services.[19]
- Third, "safe harbors" cannot be applied as if they were rules, especially where they are applied in a way that ignores other previously used, reasonable explanations of rate comparability. To be consistent with the idea of a "safe harbor," service providers must be allowed to make comparisons outside of the antiquated safe harbor ranges, and the Commission must evaluate the reasonableness of those comparisons. For instance, there are currently no safe harbor tiers above 50 Mbps, reflecting the passing of more than 15 years since the tiers were adopted and the intervening failure to account for changes in technology. But that does not mean that per-Mbps rates for a 100-Mbps circuit cannot reasonably be compared with per-Mbps rates for a 300-Mbps circuit. The Bureau made no such evaluation here.
- Fourth, when underlying capacity costs are essentially linear, as they are with satellite because of the need to purchase additional transponder capacity at relatively small increments, nothing in § 54.607(a) or in economics precludes use of per-Mbps prices for smaller capacity circuits, such as T-1s, to justify the per-Mbps rates for higher capacity circuits such as a 10, 15, 20, or 40 Mbps.

[19] *Id.* at 8–9.

An agency cannot penalize a regulated entity for violating the agency's rules unless that entity had "fair notice" of the rules.[20] The standard for whether an agency has provided fair notice is whether "by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects the parties to conform."[21] This fair notice requirement applies whenever an agency "wishes to use [its new] interpretation" of vague or ambiguous rules "to cut off a party's right."[22] And an agency will be found to have failed to provide fair notice *even if the agency's new interpretation of the rules is reasonable* if, at the time of the conduct, a reasonable person exercising reasonable care would not have known there was a violation.[23]

Here, there is simply no way that GCI could have discerned from the past *approval* of its rates that rates based on the same methodology would be found to *violate* the rules. ASTAC acknowledges this issue by also seeking clarity on the Bureau's methodology.[24] Moreover, in this case, GCI was only informed of the purported violation *after* it had already bid on, contracted for, and provided the services at issue—which underscores the unfairness of the Bureau's *post hoc* rate setting. Thus, while the full Commission may certainly adopt a new rate-setting methodology and new rates *prospectively*—provided that it does so consistent with the

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20 *See, e.g.*, *SNR Wireless License Co., LLC v. FCC*, 868 F.3d 1021, 1043 (D.C. Cir. 2017); *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995); *see also, e.g.*, *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000).

21 *Trinity*, 211 F.3d at 628; *accord Otis Elevator Co. v. Sec'y of Labor*, 762 F.3d 116, 125 (D.C. Cir. 2014).

22 *Satellite Broad. Co., Inc. v. FCC*, 824 F.2d 1, 4 (D.C. Cir. 1987); *see also United States v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998) (holding that the "fair notice" requirement applies in the absence of "explicit penalties").

23 *See Chrysler*, 158 F.3d at 1355.

24 ASTAC Comments at 6.

program requirements of 47 U.S.C. § 254(h) and the process set forth in 47 U.S.C. § 205—it may *not* do so without fair notice and then apply those changes retrospectively.

B. ASTAC Confirms that No Party Had Notice of the Bureau's Cost-of-Service Ratemaking Parameters.

ASTAC's request for an open cost proceeding to establish rates going forward buttresses GCI's points that no statutorily required hearing occurred prior to this rate prescription, and that no party had notice of how the Bureau would conduct its cost-of-service ratemaking or the parameters that it would apply. ASTAC does not dispute that the Commission has never before conducted a cost-of-service rate prescription for deregulated, detariffed, non-dominant services. Indeed, ASTAC's inability to determine how rates should be set going forward stems precisely from the fact that the Bureau's procedural and substantive requirements were novel, not previously announced, and remain unclear in the Bureau Decision.

ASTAC agrees with GCI that the Bureau Decision "fails to provide adequate guidance to establish going-forward rural rates."[25] ASTAC also agrees that advance knowledge of the applicable rules and methodologies is critical: "ASTAC and other potential RHC bidders need to know and have input on the methodology that would be applied to rural rate setting in Alaska for future RHC projects."[26] But what is true going forward is also true for the past. The reason that none of ASTAC, GCI, and any other RHC bidder or program participant can know the going-forward rules and methodologies is that the Commission has not previously articulated them. ASTAC thus underscores the lack of notice to any RHC participant as to how the Commission would determine critical aspects of a cost justification, including appropriate cost allocation

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[25] *Id.* at 7.

[26] *Id*.

methodologies and the level of the permitted cost of capital.

Notably, the Public Notice still does not provide any clarification of these factors. The Public Notice states that providers should provide a cost study that explains cost allocations, but it does not articulate any parameters for cost allocations. Similarly, the Public Notice is silent—as it must be in light of Section 205's hearing requirement—as to the appropriate cost of capital to use. But it is impossible for any provider to determine in advance—as the Public Notice directs—the rates that it may charge, without knowing either the required cost allocation methodology or the cost of capital.

These are, of course, critical factors. As GCI set forth in its AFR and further detailed in its additional comments in the rulemaking, which were also filed in support of the AFR,[27] the Bureau never responded to GCI's argument—based on longstanding, published economic analysis—that fully-distributed cost allocations are inappropriate in competitive markets. As Drs. Baumol, Koehn, and Willig pointed out in an article that was published over thirty years ago and entirely ignored by the Bureau, imposing fully distributed cost allocation on a multiproduct firm operating in a competitive market will lead to under-recovery of costs.[28] And the Bureau never conducted a substantive analysis of the appropriate cost of capital, nor did it even acknowledge the differences between the operating environments for a rural ILEC and an interexchange carrier. Notably, as GCI pointed out, rural ILECs can take advantage of NECA pooling to reduce risk—and thus lower their cost of capital—but pooling is not available to interexchange middle-mile providers like GCI. GCI must bear all the risk associated with its

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[27] Additional Comments of GCI Communication Corp. at 1 n.1, WC Docket No. 17-310 (filed Jan. 30, 2019) ("GCI Additional Comments").

[28] GCI Application for Review at 13–14 & n.31.

middle-mile investments.

The Commission cannot retroactively cure this lack of notice. The key to fair notice is providing notice of the rules in advance so that a party can conform one's decisionmaking and conduct to those rules.[29] That has not occurred here, as ASTAC's comments confirm.

II. ASTAC Does Not Dispute that the Satellite Market Is Competitive.

Although ASTAC reserved comment on GCI's rates "in markets in which there is no terrestrial-based transport and only satellite transport is available,"[30] it acknowledged that "there are often multiple satellite providers." In fact, there are four providers actively participating in the Alaska market that are capable of reaching any location in the state: AT&T, ACS, Leonardo/DRS, and GCI. And even though ASTAC states that "there may or may not be competition between satellite providers," it provides no basis for concluding that there is not competition. ASTAC might be relying solely upon whether a particular satellite provider has facilities in a given community, but that would ignore potential competition. The Commission has recognized that both actual and potential competition must be considered in assessing competition.[31] With at least four providers offering satellite-based middle-mile services in Alaska, there is no basis for concluding that rates are supracompetitive. Indeed, the existing detariffing of these interexchange packet service rates is premised on the Commission's findings of sufficient competition.[32]

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29 *See supra* notes 16–17.

30 ASTAC Comments at 9.

31 *See, e.g.*, *Business Data Services in an Internet Protocol Environment*, Report & Order, 32 FCC Rcd. 3459, 3557 ¶ 237 (2017) ("*BDS Order*").

32 GCI Additional Comments at 10; *see also* GCI Application for Review at 11–12.

III. ASTAC Fails to Articulate Why Cost-Justified Rates in a Competitive Market Are Not Market Rates, and to Provide a Market Analysis to Support the Claim that TERRA Services Are Not Provided in a Competitive Market.

A. The Only Economically Rational Way to Reconcile Detariffing and Section 54.607(b)'s Requirement for a Cost-Based Rate Is to Rely on Market Rates.

ASTAC assumes, as did the Bureau, that if GCI could not justify its rates pursuant to § 54.607(a), then in the absence of publicly available rates of other providers, GCI must justify its rates according to a traditional rate-of-return cost-of-service methodology.[33] But that entirely ignores the Commission's ever-increasing reliance on private negotiations in competitive markets—rather than tariffing or ex ante price regulation—to regulate both long distance and Ethernet service rates. Today, *no* packet-based business data services are subject to rate or tariffing regulation as a general matter,[34] and even DS-1 and DS-3 special access services are being mandatorily detariffed across the vast majority of the country.[35] ASTAC entirely ignores the Commission's rationale for adopting this forbearance, and indeed, fails to cite or discuss the *BDS Order*, in which the Commission set forth its reasoning in some detail.

As GCI set forth in its Application for Review, the Commission explained in the BDS Order that it would "apply ex ante rate regulation only where competition is expected to materially fail to ensure just and reasonable rates."[36] The Commission further found that, in its view, *potential* BDS competitors "constrain[] pricing by . . . participating in similar customer service bidding requests" even "without any physical presence of the potential competitor in the

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33 *See* ASTAC Comments at 5.

34 *BDS Order* at 3557 ¶ 237.

35 *See* 47 C.F.R. §§ 61,201 (Price cap ILECs), 61.203 (CLECs).

36 *BDS Order* at 3499 ¶ 86.

nearby geography."[37] The Commission also emphasized that for this kind of price constraint to work, potential competitors need a financial incentive to invest in new networks or facilities and then to realize a return on those investments.[38] In short, the Commission concluded that competition, coupled with the potential for additional entry in the business data services market, would suffice to ensure that rates remained just and reasonable.[39]

Significantly, ASTAC itself acknowledges that, even in Alaska locations that it insists were *not* competitive in the past, there is "now true competition for the middle mile transport provided by GCI's TERRA network."[40] Accordingly, ASTAC correctly suggests that the critical issue now is to ensure that "this competition is reflected in the . . . methodology . . . used to determine the rural rates" under the RHC program.[41]

As GCI explained in its Additional Comments in the rulemaking,[42] the Commission recognized as early as 1997 that competitive bidding is the best way to ensure that "competition is reflected in the . . . methodology . . . used to determine rural rates" under the Program.[43] Other commenters in the rulemaking likewise touted the benefits of competitive bidding as the best way to set rural rates in the RHC Program. SHLB, for example, criticized the Commission's proposed rule as "revert[ing] to rate regulation—disfavored in every other instance—instead of promoting competition," and urged that "the Commission should primarily

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37 *Id*. at 3490 ¶ 67.

38 *Id.* at 3501–02, ¶¶ 92–93, 3505 ¶ 101, 3517–18 ¶ 127.

39 *Id.* at 3530 ¶ 159.

40 ASTAC Comments at 8.

41 *Id.*.

42 GCI Additional Comments at 15.

43 ASTAC Comments at 8.

rely on the competitive bidding process to establish the rural rates for HCPs."[44] TeleQuality similarly argued that the Commission should "use market-based mechanisms" and, in particular, that "[p]romoting competitive bidding is better than increasing rate regulation."[45]

Moreover, to read §54.607(b) as requiring a rate-of-return, cost-of-service ratemaking, even where the Commission has forborne from that rate regulation, risks reintroducing the investment- and consumer-welfare-reducing errors that the Commission sought to avoid through forbearance. As a practical matter, the Bureau's rate-of-return approach is replete with the potential for errors. Even when addressing rates for a natural monopolist, which is not the case here, the courts and Commission have recognized that "deviations from fully distributed costs are in certain respects highly desirable and may tend to maximize the consumer welfare."[46] The economic literature buttresses this point even more strongly.[47] In the *BDS Order*, the Commission acknowledged forthrightly the potential for regulatory rate determinations to be erroneous, and its forbearance determinations took into account the costs of erroneous determinations as well as the benefits of accurate ones:

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[44] Additional Comments of the Schools, Health & Libraries Broadband Coalition at 5, WC Docket No. 17-310 (filed Jan. 30, 2019).

[45] Comments of TeleQuality Communications, LLC, at 4,5, WC Docket No. 17-310 (filed Jan. 30, 2019) ("TeleQuality Comments").

[46] *Nat'l Rural Telecom Ass'n v. FCC*, 988 F.2d 174, 182 (D.C. Cir. 1993). Economists are even more critical.

[47] *See* W. Baumol, M. Koehn, & R. Willig, *How Arbitrary Is 'Arbitrary'?—Or, Toward the Deserved Demise of Full Cost Allocation*, Pub. Utils. Fortnightly, Sept. 3, 1987, at 17 ("Where the activities of a firm benefit from substantial common investments or substantial common outlays (or both), there is no way to calculate a rate of return for any or all of the company's individual activities, one by one. *Indeed, the difficulty is not that we cannot determine these numbers, but that such numbers themselves are necessarily figments of the imagination*. . . . [T]he numbers that emerge from the process are indeed arbitrary, [and thus] any prices determined by the regulator with their aid can only have a random relation to the prices that would emerge in competitive markets . . . .") (emphasis added).

> Even well-crafted regulations have unintended consequences, inhibiting competition, reducing investment, and end user benefits. This is especially true in markets as highly dynamic and complex as those for BDS. In general, regulation discourages entry wherever it enforces prices that do not allow firms full cost recovery or raises the costs of entry. As the record before us indicates, both of these side effects are likely in BDS supply. Moreover, regulation in rapidly growing markets is riskier than in otherwise similar stable or stagnating markets.[48]

This is no less true for BDS and interexchange services provided to health care providers than it is for those same services offered to any other purchasers.

Accordingly, when the Commission forbears based on the presence of competition, the Commission has concluded that the market rates that result will be cost-based, and that any deviation from cost-based rates is outweighed by the risk of regulatory error.[49] Otherwise, the detariffed rates would not be just and reasonable. As such, where the Commission has forborne from ex ante rate regulation, market rates must be sufficient to satisfy the cost-based rates provision of § 54.607(b). Neither ASTAC nor the Bureau Decision explains why this would not logically be the case as a matter of law.

B. ASTAC Fails to Demonstrate that TERRA Services Are Not Provided in a Competitive Market.

ASTAC asserts that GCI TERRA services were not provided in a competitive market prior to Quintillion's service launch in December 2017.[50] ASTAC, however, offers no market analysis to support that claim and, indeed, undercuts it. Again, to the latter point, ASTAC

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48 *BDS Order* at 3517 ¶ 126.

49 *MCI Telecomms. Corp. v. FCC*, 675 F.2d 408, 410 (D.C. Cir. 1982) ("A basic principle used to ensure that rates are 'just and reasonable' is that rates are determined on the basis of cost.") The Commission, however, is not required to use rate-of-return regulation to ensure just and reasonable rates. *Nat'l Rural Telecom Ass'n v. FCC*, 988 F.2d at 182–83 (affirming price cap regulation, although not tied directly to cost).

50 ASTAC Comments at 8 (claiming that "the markets served by GCI's TERRA network were not competitive in 2017 or in prior years").

actually concedes that the terrestrial market in certain communities "became competitive" in December 2017, when Quintillion began providing service to those communities.[51] ASTAC ignores the impact of potential competition, which the Commission has recognized must be included in any market competition analysis.[52]

As GCI has set forth, the broadband market in TERRA communities consists, at a minimum, of the following: GCI, Alaska Communications Systems, Leonardo/DRS, AT&T, and now, Quintillion. Moreover, there will likely be additional entrants as new non-geostationary satellite constellations come online. Moreover, ASTAC ignores entirely the price disciplining role that the presence of other potential RFP respondents plays in competitive bidding, even when they do not bid, a principle on which the Commission relied in the *BDS Order*.[53]

Although ASTAC asserts that satellite services do not compete with TERRA service, it offers no supporting data or economic analysis. While it is true that satellite has some service disadvantages as compared to terrestrial networks, that does not mean that satellite and terrestrial networks are in entirely separate product markets, or that satellite services do not exert discipline on pricing for terrestrial services. The Commission cannot rely on ASTAC's conclusory assertions about its "first-hand knowledge" and "familiar[ity] with" GCI's rates, especially since the Commission has already determined these markets to be competitive and thus detariffed.[54] Similarly, ASTAC's assertion that Quintillion offers service at rates more than 50% lower than GCI's TERRA and satellite rates does not establish that GCI's rates are supracompetitive. In any

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51 *Id.* at 13–14.

52 *BDS Order* at 3557 ¶ 237.

53 *Id.* at 3490 ¶ 67.

54 ASTAC Comments at 3, 6.

event, ASTAC provides no documentation to support its assertion, and provides no context as to the rates it purportedly compares.[55]

In any case, if Quintillion's rates are indeed better than GCI's, then the company (or its resellers such as ASTAC) will win business in the marketplace as health care providers reach the end of existing contracts and rebid. Existing rules already require health care providers to select the most cost-effective bid for the supported services. The market, and not arbitrary cost-of-service rate regulation, will drive prices down, as the Commission predicted when it detariffed rates in the *BDS Order*.

IV. No Party Defends the Bureau's Failure to Adhere to Section 205's Hearing Requirements or Its Overreach to Decide Novel Issues of Law or Policy.

Even though ASTAC urges the Commission to deny the GCI Application for Review, it does not defend the Bureau's failure to conduct a hearing, as required by Section 205, or the Bureaus actions to decide, on delegated authority, novel issues of law or policy that Commission rules reserve to the Commission itself.

The GCI Application for Review explains in detail why the rate-of-return regulation imposed in the Bureau Decision is procedurally inappropriate and statutorily unlawful.[56] First, the Bureau has no authority to adopt "ratemaking instructions . . . direct[ing] exclusions from and additions to the rate base" for which the Commission's rules do not "specifically provide."[57] Second, 47 U.S.C. § 155(c)(1) expressly *prohibits* the Commission from delegating to the

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55 *Id.* at 15.

56 GCI Application for Review at 19–23.

57 *Responsible Accounting Officer Letter 20,* Mem. Op. & Order & Notice of Proposed Rulemaking, 11 FCC Rcd. 2957, 2961–62 ¶¶ 25–29 (1996).

bureaus the power to conclude hearings on the lawfulness of rates.[58] Accordingly, only the full Commission, not the Bureau, has the authority to determine lawful rates, both prospectively and retrospectively.

Furthermore, the 10.875% ILEC-prescribed rate of return that the Bureau imposed—itself a novel issue and a violation of Section 205—is inapplicable to the markets here. First, the Commission has not adopted a prescribed rate of return for interexchange services, let alone for interexchange services to rural Alaska. Second, there is no reason to think that it would be reasonable to apply the ILEC-prescribed rate of return here. As discussed above, GCI pointed out significant differences between the risk sharing mechanism available to rural ILECs through NECA pooling and those available to rural interexchange carriers.[59]

CONCLUSION

For the foregoing reasons, and those presented in GCI's Application for Review, the Commission should reverse the Bureau Decision prescribing reduced rural rates for GCI. The Bureau Decision not only exceeded the Bureau's authority, but was also substantively flawed as a matter of sound economics and adherence to the Commission's prior decisions regarding both the state of competition for these services and the public interest in deregulating these services. Accordingly, GCI's rural rates should be approved as submitted, or at a minimum, the rates must be re-prescribed by the Commission, after a hearing, at a higher level.

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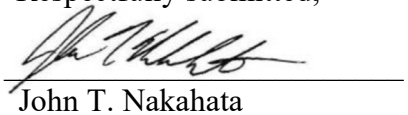
[58] 47 U.S.C. § 155(c)(1).

[59] *See supra* p. 10.

Respectfully submitted,



John T. Nakahata
Jennifer P. Bagg
Courtney Miller
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street NW, 8th Floor
Washington, D.C. 20036
(202) 730-1300

Counsel for GCI Communication Corp.

Tina Pidgeon
Christopher Nierman
GCI COMMUNICATION, CORP.
1900 L Street NW, Suite 700
Washington, DC 20036
(202) 503-2851

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